

JACK C. GUTTE

IBLA 90-532

Decided June 23, 1992

Appeal from a decision of the Area Manager, Redding Resource Area, California, Bureau of Land Management, adjusting rental for access road right-of-way CA-8249.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights- of-Way--Rent--Rights-of-Way: Appraisals--Rights-of-Way: Federal Land Policy and Management Act of 1976

BLM properly increased the rental for an existing FLPMA linear right-of-way using the regulatory rental fee schedule for linear rights-of-way, when the regulation calling for rental adjustment at least once every 5 years was expressly incorporated into appellant's right-of-way grant, and the regulatory fee schedule was applicable during the course of a periodic adjustment necessary to reflect the then current fair market rental value.

APPEARANCES: Jack C. Gutte, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Jack C. Gutte has appealed from a July 24, 1990, decision of the Area Manager, Redding Resource Area, California, Bureau of Land Management (BLM), adjusting the rental for access road right-of-way CA-8249.

On April 28, 1980, Gutte filed an application for a right-of-way for an existing road, 3,300 feet long and 40 feet wide (i.e., 3.03 acres), in the NW $\frac{1}{4}$ sec. 32, T. 33 N., R. 6 W., Mount Diablo Meridian, Shasta County, California, to provide access to his private property in section 30 of that township. 1/ In a letter dated July 11, 1980, BLM informed Gutte that it

1/ At that time, the proposed right-of-way along Deadwood Gulch was subject to special use permit No. 04-030-S-9, which was to expire on May 20, 1980.

would grant a right-of-way, that he was required to pay \$90 as advance rental "for the first 5 years," and that "a new appraisal will be conducted at least once every 5 years to determine correct fair market value." Receiving no response, BLM again sent its July 1980 letter to Gutte on August 26, 1980, reminding him that he must pay the \$90 advance rental. On September 5, 1980, BLM received the \$90 rental payment.

BLM issued right-of-way CA-8249 to Gutte effective October 28, 1980. ^{2/} The grant document specified a 30-year term, subject to a rental of "\$90.00 for 5 years at \$18.00 per year." Paragraph 4 of the grant provided that the grant was "subject to review at the end of 20 years from the date of this decision [Oct. 28, 1980], and at regular intervals thereafter not to exceed 10 years." The last clause of the grant stated that "[b]y acceptance hereof, the holder agrees that the right-of-way is subject to the applicable regulations contained in 43 CFR 2800, and to the terms and conditions of this grant."

On July 10, 1984, a BLM appraiser reviewed the rental requirement and recommended that the rental remain at \$90 for an additional 5-year period. On September 13, 1985, BLM received payment of that amount. Near the end of this second 5-year term, the rental was once again reviewed. In his July 1990 decision, the Area Manager stated that, after reviewing Gutte's current rental in accordance with 43 CFR 2803.1-2, BLM was readjusting the rental to \$443 for the 5-year period from November 1, 1990, to December 31, 1995, to conform his rental with the "new rental fee schedule." ^{3/} The Area Manager also noted that Gutte's 5-year billing cycle was being changed to coincide with the calendar year to meet the requirements of 43 CFR 2803.1-2(a). Gutte was directed to submit the \$443 within 30 days from the date he received the decision. Gutte appealed from this decision.

In his statement of reasons for appeal, Gutte objects to the increased rental. He asserts that, under paragraph 4 of his grant, the rental cannot be reviewed and changed for a period of 20 years from the date of the grant and argues that the rental imposed by the decision on appeal was derived from the new rental fee schedule, which was to "become effective for existing grants * * * when they are scheduled for review," citing 51 FR 31889 (Sept. 5, 1986) in support of his position.

[1] When Gutte's right-of-way was issued the applicable statute required payment of an annual advance rental equal to the "fair market

^{2/} Gutte's right-of-way was issued pursuant to Title V of the Federal Land Policy and Management Act of 1976 (FLPMA), as amended, 43 U.S.C. §§ 1761-1771 (1982).

^{3/} BLM determined the annual rental by multiplying the right-of-way acreage (3.03 acres) by the \$28.33 per acre annual rental rate for a Zone 6 right-of-way (\$85.84 per year). See Snyderville Basin Sewer Improvement District, 111 IBLA 235, 237 (1989). It then calculated the rental for a 5-year period from Jan. 1, 1991, to Dec. 31, 1995 (5 x \$85.84 or \$429, when rounded), and added a pro-rated rental for the 2 remaining months of 1990 (\$14, when rounded). The total rental for the 5-year 2-month period was \$443.

value" of the right-of-way. 43 U.S.C. § 1764(g) (1982). This statute also authorized the Secretary of the Interior to require payment for more than one year if the rental was less than \$100. See also 43 CFR 2803.1-2(a) (1981); William F. Bieber, 82 IBLA 6 (1984). The regulations implementing this statute, found at 43 CFR Part 2800, expressly provided for periodic rental adjustment. The specific proviso stated that the rental fees "may be * * * adjusted whenever necessary to reflect current fair market value * * * as a result of reappraisal of the fair market values, which shall occur at least once every 5 years." 43 CFR 2803.1-2(d)(1) (1981).

The right-of-way grant issued to Gutte stated that the "holder agrees that the right-of-way is subject to the applicable regulations contained in 43 CFR [Part] 2800." Under the heading "Details of Grant," the "applicable" regulations are listed as "Sections 2801 through 2806.2, Title 43, Code of Federal Regulations." Thus, the regulation calling for rental adjustment was expressly incorporated into appellant's right-of-way grant. The fair market value of that grant was subject to reappraisal "at least once every 5 years." 43 CFR 2803.1-2(d) (1981). BLM reconsidered the rental prior to the expiration of the first 5-year period, found it unnecessary to adjust the rental, and Gutte paid the next 5-year rental installment in 1985.

As noted above, prior to the end of the second 5-year period, BLM again examined the fair market rental for Gutte's right-of-way. Between 1985 and BLM's examination, Congress had amended section 504(g) of FLPMA and BLM had promulgated new regulations which BLM was required to take into account when considering the fair market rental value. ^{4/} Section 504(g) of FLPMA, as amended, 43 U.S.C. § 1764(g) (1988), continues to require advance payment of the "fair market value" of the right-of-way. It also provides that the Secretary may require payment either for 1 year or "more than one year," without a limitation on the amount of the yearly rental. Id. The amended regulations authorize BLM to require payment for an entire 5-year period if the annual rental is \$100 or less. See 43 CFR 2803.1-2(a). Thus, the Area Manager's call for payment of the rental for the full 5-year term in his July 1990 decision was within his authority, as the adjusted annual rental for Gutte's right-of-way is less than \$100.

The applicable regulations have been substantially revised to provide for fair market rental value determinations for linear rights-of-way (e.g., pipelines, roads, and utility lines) based on an established fee schedule, which is adjusted annually to reflect economic changes, rather than by individual appraisal. ^{5/} See 43 CFR 2803.1-2(c)(1). To compute the annual rental pursuant to this regulation, the acreage subject to the

^{4/} Section 504(g) of FLPMA was amended by section 2 of the Act of Oct. 27, 1986, P.L. 99-545, 100 Stat. 3048.

^{5/} The regulations were revised effective Aug. 7, 1987. See 52 FR 25811 (July 8, 1987); Tucson Electric Power Co., 111 IBLA 69, 74-75 (1989). In certain circumstances not relevant here, the regulations provide for an individual appraisal. See 43 CFR 2803.1-2(c)(1)(v); Great Co., 112 IBLA 239, 240-41 (1989).

right-of-way is multiplied by the per acre rental value established for the region (or zone) in which the right-of-way is found. See 43 CFR 2803.1-2(c)(1)(iv).

Gutte does not dispute the validity of the rental fee schedule, but challenges its applicability to his right-of-way. He argues that the schedule is not applicable to his right-of-way until it is "subject to review" (51 FR 31889 (Sept. 5, 1986)), and that it is not subject to review for a period of 20 years from the date of the grant, or October 28, 2000.

Gutte has misconstrued the preamble to the proposed rulemaking leading to the new rental fee schedule. The preamble not only stated that the "new rental payments," set out in the schedule, would become effective for existing right-of-way grants when they are "scheduled for review," but also provided that the scheduled rentals would be applied when a linear right-of-way grant is reviewed for "possible payment adjustment." 6/ 51 FR 31889 (Sept. 5, 1986). The preamble also stated that the review and possible payment adjustment "generally has been on a five-year rotation." Id. The entire phrase "review and possible payment adjustment" clearly refers to determination of the fair market rental amount both during any general review of the right-of-way at the end of the stated term and during the course of any adjustment necessary to reflect current fair market value. 7/

Gutte's right-of-way grant expressly provided for an initial rental payment for a 5-year period and specifically incorporated 43 CFR 2803.1-2(a) (1981), calling for periodic rental review at least once every 5 years. Appellant was also forewarned by BLM's July 1980 letter that BLM would redetermine fair market value "at least once every 5 years." When issued, his grant clearly provided for recomputation of rentals on a 5-year rotation. The statement in paragraph 4 of appellant's right-of-way grant that it is subject to review after 20 years refers to a review of all terms and conditions of the grant, including the rental, but did not preclude periodic rental adjustments to reflect the then-existing fair market rental amount. To hold otherwise would be contrary to express regulatory requirements incorporated into the grant. Those regulations call for recomputation of the fair market rental at least once every 5 years. 8/ See 43 CFR

6/ The preamble stated in full that the "new rental payments would become effective for existing grants * * * when they are scheduled for review and possible payment adjustment." 51 FR 31889 (Sept. 5, 1986).

7/ The preamble to the proposed rulemaking also provided that, before application of the new rental fee schedule to an existing right-of-way grant, BLM would provide advance notification. That requirement was codified in 43 CFR 2803.1-2(c)(2)(i). Notice was provided by the Area Manager's July 1990 decision, well in advance of the end of the second 5-year period (Oct. 28, 1990).

8/ In Information Bulletin No. 90-205, dated Mar. 23, 1990, at page 1, the Director, BLM, stated that rental adjustments for rights-of-way existing when the new rental fee schedule was promulgated would, "[a]bsent specific language in the authorization document to the contrary," be adjusted

2803.1-2(d) (1981). The second 5-year rental period of appellant's grant was due to expire on October 28, 1990, and BLM was required to consider the fair market rental amount for the ensuing 5 years.

Gutte has not demonstrated that the new rental fee schedule should not be applied to his linear right-of-way for the third 5-year rental period of his grant. BLM determined the fair market rental for Gutte's right-of-way using the regulatory schedule, and Gutte offered no evidence supporting the conclusion that it was improper to apply the schedule or showing that BLM did not correctly follow the schedule. We therefore conclude that, in his July 1990 decision, the Area Manager properly deemed the rental for Gutte's right-of-way for the 5-year period from November 1, 1990, to December 31, 1995, to be \$443 using the linear right-of-way rental fee schedule codified at 43 CFR 2803.1-2. See Mr. & Mrs. Gerald H. Murray, 117 IBLA 138, 140-41 (1990); Tucson Electric Power Co., 113 IBLA 327, 331 (1990); Keith P. Carpenter, 112 IBLA 101, 102 (1989).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

I concur:

James L. Burski
Administrative Judge

fn. 8 (continued)

"as appropriate, customarily at least once every 5 years." Gutte's grant contains no "specific language" providing for rental adjustment at other intervals.

